RECEIVED
NOV - 6 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-5565

ROBERT WAYNE WILLIAMS,

PETITIONER,

VERSUS

THE STATE OF LOUISIANA,

RESPONDENT.

AFFIDAVIT OF PETITIONER, ROBERT WAYNE WILLIAMS,
IN SUPPORT OF MOTION TO PROCEED
IN FORMA PAUPERIS

I, ROBERT WAYNE WILLIAMS, being under oath, depose and say the following in support of the Motion To Proceed In Forma Pauperis:

1. I am the petitioner in the above-captioned case before this Court and am filing this affidavit in support of a motion for leave to proceed in forma pauperis in this Court;

2. I am presently incarcerated under sentence of death at Louisiana State Penitentiary in Angola, Louisiana;

3. I am unable to pay the fees and costs of this proceeding or give security therefor because of my poverty;

4. I believe I am entitled to the redress sought in the Petition For Writ Of Certiorari;

5. The issues which I desire to present to this Court are set forth more fully in the Petition For Writ Of Certiorari filed on October 17, 1980, and involve challenges to my death sentence on the grounds that the Supreme Court of Louisiana has failed to construe the capital sentencing statute in Louisiana in a manner

consistent with the dictates of the Constitution of the United States of America.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 24 day of October, 1980.

Robert Wayne Williams
ROBERT WAYNE WILLIAMS, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME this 24 day of October, 1980, at Angola, Louisiana.

Rudy S. Mayeux
NOTARY PUBLIC

RECEIVED
OCT 16 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 80-5565

ROBERT WAYNE WILLIAMS, Petitioner,

VERSUS

STATE OF LOUISIANA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

BELHIA V. MARTIN
344 CAMP STREET--SUITE 708
NEW ORLEANS, LOUISIANA 70130
(504) 581-3647

COUNSEL FOR PETITIONER

October 14, 1980

QUESTIONS PRESENTED

1. WHETHER THE SENTENCING CHARGE TO THE JURY WAS UNCONSTITUTIONAL AND IN VIOLATION OF FURMAN V. GEORGIA, 408 U.S. 238 (1972) AND GODFREY V. GEORGIA, NO. 786899, cert. grtd., _____ U.S. _____, 100 S.Ct. 204, 62 L.Ed.2d 133 BECAUSE THE INSTRUCTIONS FAILED TO PROVIDE CLEAR AND OBJECTIVE STANDARDS FOR THE EXERCISE OF THE JURY'S SENTENCING DISCRETION.

2. WHETHER PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE SUPREME COURT OF LOUISIANA REVIEWED ONLY ONE AGGRAVATING CIRCUMSTANCE FOUND BY THE JURY TO SUPPORT ITS VERDICT OF DEATH.

3. WHETHER PETITIONER'S RIGHT TO AN IMPARTIAL JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY THE DISMISSAL FOR CAUSE OF THREE JURORS WHO NEVER STATED THAT THEY WERE IRREVOCABLY AGAINST IMPOSING THE DEATH PENALTY.

TABLE OF CONTENTS

Questions Presented i

Opinion Below 1

Jurisdiction 1

Relevant Constitutional and Statutory Provisions 2

Statement of the Case 2

Reasons for Granting the Writ 6

I. WHETHER THE SENTENCING CHARGE TO THE JURY WAS UNCONSTITUTIONAL AND IN VIOLATION OF FURMAN V. GEORGIA, 408 U. S. 238 (1972) AND GODFREY V. GEORGIA, NO. 786899, cert. grtd., U.S. , 100 S. Ct. 204, 62 L.Ed. 2d 133 BECAUSE THE INSTRUCTIONS FAILED TO PROVIDE CLEAR AND OBJECTIVE STANDARDS FOR THE EXERCISE OF THE JURY'S SENTENCING DISCRETION . 6

II. WHETHER PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE SUPREME COURT OF LOUISIANA REVIEWED ONLY ONE AGGRAVATING CIRCUMSTANCE FOUND BY THE JURY TO SUPPORT ITS VERDICT OF DEATH. 10

III. WHETHER PETITIONER'S RIGHT TO AN IMPARTIAL JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY THE DISMISSAL FOR CAUSE OF THREE JURORS WHO NEVER STATED THAT THEY WERE IRREVOCABLY AGAINST IMPOSING THE DEATH PENALTY 12

Conclusion 14

Appendices .....

Appendix A (Opinion of the Supreme Court ofLouisiana)

Appendix B (Order of Mr. Justice Powell)

Appendix C (Stay of Execution of the Supreme Court of Louisiana)

Appendix D (Relevant Louisiana Statutes and Court Rules)

Appendix E (Trial court's instructions to the jury at sentencing phase of petitioner's trial).

Appendix F (Relevant portions of voir dire of jurors)

No. 80-5565

RECEIVED
OCT 2 7 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TABLE OF AUTHORITIES

Page:

Adams v. Texas, ____ U.S. _____ (1980)..... 14

Coley v. State, 231 Ga. 824 204 S.E.2d 612 .....

Davis v. Georgia, 429 U.S. 122 (1976)..... 14

Furman v. Georgia, 408 U.S. 238 (1972)..... 6, 7,10

Gregg v. Georgia, 428 U.S. 153 (1976)..... 7, 10,12

Godfrey v. Georgia, No. 7868944, cert. grtd, ____ U.S. ____, 100 S.Ct. 204, 62 L.Ed.2d 133..... 6,7,8,9

House v. State, 232 Ga.140, 205 S.E.2d 217 (1974).... 9

McCorquodale v. State, 233 Ga. 369, 211 S.E.2d. 577 (1974)..... 9

Proffit v. Florida, 428 U.S. 242 (1976)..... 7

State v. Robert Wayne Williams, (No. 65,563) 383 So.2d 369 (La 1980)..... 10

State v. Sonnier, 376 So.2d 1336 (La 1980)..... 8,9

Witherspoon v. Illinois, 391 U.S. 510 (1968)..... 13,14

Constitutional Provisions

Constitution of the United States of America

Eighth Amendment..... 2

Fourteenth Amendment..... 2

Sixth Amendment..... 2,14

Statutes

Title 28 U.S.C. §1257(3)..... 2

Georgia Code Annotated 32-2534.1(b)7..... 7,9

Louisiana Code of Criminal Procedure, Article 905.3... 2

Louisiana Code of Criminal Procedure, Article 905.4 (as enacted in 1976).. 2,6,9

Louisiana Code of Criminal Procedure, Article 905.5 .. 2

Louisiana Code of Criminal Procedure, Article 905.6... 2,5

Louisiana Code of Criminal Procedure, Article 905.7... 2,5

Louisiana Code of Criminal Procedure, Article 905.8... 2

Louisiana Code of Criminal Procedure, Article 905.9... 2

Louisiana Revised Statute 14:30..... 2

Louisiana Supreme Court Rule 28..... 2

RECEIVED
OCT 16 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO.

ROBERT WAYNE WILLIAMS,

Petitioner,

VERSUS

STATE OF LOUISIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

The petitioner, ROBERT WAYNE WILLIAMS, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana affirming his conviction and sentence of death. On April 7, 1980, the Supreme Court of Louisiana entered the judgment in State of Louisiana v. Robert Wayne Williams, No. 65563, and rehearing was denied on May 19, 1980.

OPINION BELOW

The opinion of the Supreme Court of Louisiana is reported at 383 So.2d 369 (La.1980) and is attached hereto as Appendix A.

JURISDICTION

The judgment and opinion of the Supreme Court of Louisiana were filed on April 7, 1980. On May 19, 1980, the petition for rehearing was denied by the Supreme Court of Louisiana. On May 28, 1980, the District Court for the Seventeenth Judicial District (Parish of East Baton Rouge) signed a death warrant

which set the petitioner's execution date for August 27, 1980. On June 19, 1980, this Court, per Mr. Justice Powell, granted petitioner's application for an extension of time to October 16, 1980, within which to file the petition for writ of certiorari. (Appendix B.) The Supreme Court of Louisiana stayed petitioner's execution on August 19, 1980 "until the Supreme Court of the United States takes final action on his petition or until such time, in advance of that date, as this Court deems proper". (Appendix C.) This Court's jurisdiction to review by writ of certiorari is invoked under 28 U.S.C. §1257(c).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case involves the following provisions of the Louisiana Code of Criminal Procedure and the Louisiana Supreme Court Rules: Article 905.3; Article 905.4 (as enacted in 1976); Article 905.4 (as enacted in 1979); Article 905.5; Article 905.6; Article 905.7; Article 905.8; Article 905.9; Louisiana Supreme Court Rule 28. These articles and the Supreme Court Rule are set forth in Appendix D.

STATEMENT OF THE CASE

On January 17, 1979, the grand jury of East Baton Rouge, State of Louisiana filed an indictment[1] charging the petitioner, Robert Wayne Williams with first degree murder in violation of Louisiana Revised Statute 14:30.[2]

---

1 This indictment is set forth fully in the transcript, Vol. II at 8.

2 At the time of the offense, Louisiana Revised Statute 14:30 specified:

> "First degree murder is the killing of a human being when the offender has a specific intent to

Footnote Continued

The prosecutor at petitioner's trial called three eyewitnesses who testified generally to the following facts.[3] On January 5, 1979, petitioner and Ralph Holmes entered the A & P Supremarket located at 3525 Perkins Road in Baton Rouge, Louisiana. (Tr. Vol. II at 40) (Tr. Vol. II at 69) (Tr. Vol. II at 77). Both men wore ski masks while in the store (Tr. Vol. II at 41, 69 & 78). Petitioner carried a 12-guage sawed-off shot gun (Tr. Vol. II at 41, 70, 77 & 78). Ralph Holmes carried a pistol (Tr. Vol. II at 42, 70 & 78).

Both men went immediately to the guard in the store, James Kelly. One of the men tried to disarm Mr. Kelly by pulling at his pistol holster (Tr. Vol. II at 41). The guard bent down in an attempt to unstrap the pistol (Tr. Vol. II at 41). Petitioner hollered at Kelley, "don't try it", at which time petitioner shot Mr. Kelley in the face. The guard immediately fell over the counter (Tr. Vol. II at 42 & 70).

Ralph Holmes forced one of the eyewitnesses to remove money from the store's safe. (Tr. Vol. II at 42, 70 & 78). Both petitioner and Holmes forced the store manager and one of the customers to give them money out of two cash registers (Tr. Vol. II at 13, 70 & 78). During this process, Ralph Holmes used his pistol to strike one of the customers in the head (Tr. Vol. II

---

2 Footnote Continued

> kill or inflict great bodily harm. Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation or suspension of sentence in accordance with the recommendation of the jury.

3 The other two eyewitnesses gave no detail about James Kelley's attempt to remove his pistol from the holster, nor petitioner's or Ralph Holmes' attempt to disarm the guard.

at 43, 70 & 78). Also at this time the petitioner dropped his weapon. The shotgun went off and two of the customers were shot in their feet (Tr. Vol. II at 43, 74 & 79).

On cross examination, one of the eyewitnesses testified that both petitioner and Ralph Holmes appeared nervous (Tr. Vol. II at 64). The witness further testified that petitioner seemed as frightened as he was when the shotgun went off striking the customers (Tr. Vol. II at 65).

Another witness called by the prosecutor testified that the police received a telephone call from an informat inplicating Ralph Holmes, the petitioner and the petitioner's wife, Pamella Williams (Tr. Vol. II at 135). After petitioner and his wife were arrested, both gave confessions which implicated them in the crime (Tr. Vol. II at 128, 132 & 154).

Petitioner stated in taped confession that he did not deliberately shoot the guard but that the gun discharged accidentally (Tr. Vol. II at 134).

The defense called three witnesses who knew petitioner for several years. These witnesses testified that they had personally witnessed petitioner shoot herion and preludin into his body or smoke marijuana (Tr. Vol. II at 208-216). None of these witnesses had seen petitioner use any of these drugs on the day of the killing. However, all testified that whenever petitioner used the drugs he appeared nervous or jumpy (Tr. Vol. II at 209, 213 & 216). The defense and prosecutor stipulated that if the coroner were to testify he would say that injection of preludin would cause someone to be aggitated or nervous (Tr. Vol. II at 217).

At the conclusion of the sentencing hearing, the trial judge instructed the jury on all statutory aggravating circumstances by reading to it Louisiana Code of Criminal Procedure Article 905.4 (as enacted in 1979) (Appendix F, Tr. 299-300).

On April 19, 1979, the jury recommended a sentence of death under Articles 905.6 and 905.7 of the Louisiana Code of Criminal Procedure (M.8) and found three statutory aggravating circumstances: (1) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery; (2) the offender knowingly created a risk of death or great bodily harm to more than one person; (3) the offense was committed in an especially heinous, atrocious or cruel manner (Tr. Vol. I at 304). Pursuant to Article 905.8 of the Louisiana Code of Criminal Procedure, which requires the judge to sentence "the defendant in accordance with the recommendation of the jury" (Appendix D, 3), the petitioner was sentenced to death on May 30, 1979.

On April 7, 1980, the Supreme Court of Louisiana affirmed petitioner's conviction and death sentence. The court reviewed the evidence in support of the first aggravating circumstance found by the jury and "[h]aving concluded that the jury correctly found one aggravating circumstance to exist," the court deemed it unnecessary to inquire whether the jury could have correctly found that the remaining two existed. (Appendix A at 8.)

The petitioner then filed an application for rehearing in which he contended inter alia, that the Supreme Court of Louisiana had erred in not reversing petitioner's sentence of death where the jury who imposed such sentence was unconstitutionally composed and erred in failing to review two of the aggravating circumstances. Petitioner further contended that the court erred by holding that the jury correctly found that the offense was committed in an "especially heinous atrocious or cruel manner". On May 19, 1980, the petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

I

THE SENTENCING CHARGE TO THE JURY WAS UNCONSTITUTIONAL AND IN VIOLATION OF FURMAN V. GEORGIA, 408 U.S. 238 (1972) AND GODFREY V. GEORGIA, NO. 786899, cert. grtd., ____ U.S. ____, 100 S.Ct. 204, L.Ed.2d 133 (1980) BECAUSE THE INSTRUCTIONS FAILED TO PROVIDE CLEAR AND OBJECTIVE STANDARDS FOR THE EXERCISE OF THE JURY'S SENTENCING DISCRETION.

There were three aggravating circumstances found by the jury at petitioner's trial: (1) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravating burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;... (2) the offender knowingly created a risk of death or great bodily harn to more than one person; ... (3) the offense was committed in an especially heinous, atrocious, or cruel manner; ..." (M.8).

The jury's conclusion that the offense was committed in an especially heinous, atrocious or cruel manner was reached without the proper guidelines as required by the Sixth and Fourteenth Amendments to the United States Constitution and as enunciated in Furman v. Georgia, 408 U.S. 238 (1972) and Godfrey v. Georgia, No. 786894, cert. grtd,. _____ U.S. ____, 100 S.Ct. 204, 62 L.Ed. 2d 133.

The trial court in petitioner's case simply read to the jury Louisiana Code of Criminal Procedure Article 905.4 (as enacted in 1976),[4] which list the aggravated circumstances to be considered by the jury in the sentencing phase of the trial. No standards of how these phrases should be interpreted were supplied to the jury by the court.

It is clear from Godfrey v. Georgia, supra, that this court will not tolerate a trial judge merely repeating to the jury the

---

[4] Full text of the trial court's sentencing instructions is given in Appendix E Tr. 299-302.

language of the statutory aggravating circumstances where a defendant can receive the death penalty. Godfrey v. Georgia, supra, slip opinion at p.7. When referring to similar instructions[5] given by the trial court in Godfrey, the Court stated:

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence.

This, there were no "specific and detailed guidance,"[6] to "channel the sentencer's discretion"[7] by clear and objective standards as was required by Gregg v. Georgia, 428 U.S. 153 (1976) and Furman v. Georgia, 408 U.S. 238 (1972).

However, the court in Godfrey v. Georgia, supra reversed the sentence because the statute had not been construed in a constitutional manner. It concluded that the facts in defendant's case could not be interpreted to to meet the criteria as defined by the Georgia Supreme Court when interpreting Ga.Code Ann. §27-2534.1(b)(7) in its many cases. Godfrey at 12.

The Court in Godfrey v. Georgia, supra concluded that "the petitioner's crime cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." Godfrey v. Georgia, supra (slip opinion at 12).

A review of the facts in petitioner's case reveals that the Louisiana Supreme Court also failed to apply the criteria it has established to interpret the meaning of an offense which is "outrageously or wantonly vile, horrible or inhuman." That court

5 The court in Godfrey, supra, read to the jury Ga. Code Ann. §27-2534.1(b)(7). The pertinent part of that statute listed, as a statutory aggravating circumstance upon which a death sentence may be based, that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim.

6 Gregg v. Georgia, supra 428 U.S. at 198, quoting Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1979)

7 Proffit v. Florida, supra, 428 U.S., at 253 (opinion of Stewart, Powell and Stevens, JJ.).

in State v. Sonnier, 376 So.2d 1336 (La. 1980) held the following:

> Any system that seeks to distinguish rationally among murders in terms of heinousness, must necessarily incorporate into the concept some idea of torture or pitiless infliction of unnecessary pain on the victim. State v. Sonnier, supra at 1361.

The trial judge in the instant case did not give instructions to the jury which included the standard articulated in Godfrey v. Georgia, supra. Nor did the trial judge follow the standards set by the Louisiana Supreme Court in State v. Sonnier, supra.

Furthermore, had the Louisiana Supreme Court reviewed the facts around both the United States Supreme Court cases and cases from its court which have been used to define an outrageously vile, horrible or inhuman offense, or an offense done in an especially atrocious or cruel manner it would have seen that the facts around petitioner's case are inapplicable to these definitions.

In the case of Godfrey v. Georgia, supra, the defendant, after a final rejection from his wife shot both his wife and mother-in-law whom he thought had influenced his wife to leave him. Both victims died instantly. The defendant later admitted that he had contemplated his offense for eight years. Yet, the court in Godfrey, supra held that it was not an offense which showed that the defendant had a consciousness more "depraved" than that of any other person guilty of murder.

As in Godfrey, supra the security guard in this case suffered no physical harm to other than the shot that killed him. It is reasonable to conclude that the security guard was shot because he was reaching for his gun.

In comparison to Godfrey, supra there is no evidence that the petitioner entered the store with the intent to shoot the security guard. Thus, the petitioner's state of mind cannot be described as more "depraved" than that of any murderer.

The court in Godfrey, supra pointed to cases decided by the Georgia Supreme Court which exemplified defendants who could be said to have minds more "depraved" than that of any murderer. The court cited cases such as McCorquodale v. State, 233 Ga. 369 211 S.E.2d 577 (1974) and House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), Godfrey v. Georgia, (slip opinion at 8). In McCorquodale v. State, supra and House v. State, supra, the victims were beaten, mutilated, and treated in an inhuman fashion.

Similar to the Georgia Supreme Court, the Supreme Court of Louisiana established a standard for interpreting La.C.C.P Art. 905.4(g) in State v. Sonnier, supra. This standard was based on facts around the case.

In State v. Sonnier, supra a young couple was taken to a remote area, where the male victim was handcuffed to a tree. His girlfriend was taken a short distance away and raped by one of the defendants. The other defendants had sex with her based on a promise that the couple would be released. The victims were then shot lying side by side. Clearly these facts are not comparable to those in the instant case.

It is unreasonable for statutes such as Georgia Code Ann. 327-2534.1 and La.C.C.P. Art. 905.4(g), which are in all major respects the same, to be applied with insufficient judicial guidelines to murders which are as substantially different is those in McCorqudale v. State, supra; State v. Sonnier, supra and the instant case.

Consequently, the court should grant the petitioner a writ of certiorari from the Supreme Court of Louisiana and remand for further proceedings in light of Godfrey v. Georgia, ___ U.S. ___, 100 S.Ct. 204, 62 L.Ed.2d 133 (1980).

II

THE PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE SUPREME COURT OF LOUISIANA REVIEWED ONLY ONE AGGRAVATING CIRCUMSTANCE FOUND BY THE JURY TO SUPPORT ITS VERDICT OF DEATH.

In the decision of the Louisiana Supreme Court the Court stated:

> The jury having properly concluded that at least one statutory aggravating circumstance existed, it was within their power to return a recommendation of death without finding other aggravating circumstances. Thus, further inquiry as to whether these other aggravating circumstances were properly found to exist is merely cumulative and unnecessary to support the jury's verdict.[8] State v. Robert Wayne Williams, (Appendix A at 8).

This reasoning by the Louisiana Supreme Court has two essential flaws: (1) it ignores the manner in which the capital sentencing statute operates in Louisiana; and (2) it is wholly inconsistent with several decisions of the Supreme Court of the United States.

Furman v. Georgia, and 108 U.S. 238 (1972) mandates that where "discretion is afforded a sentencing body in a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976). Consequently, appellate review of the basis for a jury's decision to impose the death sentence is an indispensable feature of a valid capital sentencing system under the United States Constitution.

---

8 Full text of this opinion is reproduced in Appendix A of this petition.

The Louisiana Supreme Court's conclusion that its appellate review responsibilities necessitates consideration of only one aspect of the jury's decision ignores several features of the Louisiana sentencing procedure. Neither the trial court's instructions nor any provisions of the Louisiana statute require the jury's death sentence to be unanimously based on any single aggravating fact or found by the jurors. Second, pursuant to Article 905.7 of the Louisiana Code of Criminal Procedure, the jury is only required to return a general verdict recommending "that the defendant be sentenced to death," listing the statutory aggravating circumstances found to exist and stating the mitigating circumstances have been considered. This is precisely the form of the verdict returned by the jury in the present case. (Tr.12). Third, the instructions to the jury advised the jurors that they were authorized to consider imposing a death sentence if they found beyond a reasonable doubt that any of the statutory aggravating circumstances existed (Appendix E at 300). The court then stated that if it found the existence of any aggravating circumstance it must also consider any mitigating circumstance before deciding to impose a death sentence (Appendix E at 300). At no point did the court instruct the jury that even if it did not find any mitigating circumstances, though it had found at least one aggravating circumstance, it was still authorized to return a verdict of life imprisonment without benefit of probation, parole or suspension of sentence (Appendix E).

Since the jury instructions did not expressly call for jury unanimity on the circumstance(s) which would warrant a sentence of death, it is possible that some members of the jury might well have voted for death solely on the bases of the first aggravating circumstance. Which was reviewed by the Louisiana Supreme Court, while the remaining jurors might have been swayed by either the second or third aggravating circumstances.

Consequently, while there is a likelihood that the second and third aggravating circumstances played come role in the jury's ultimate decision to impose the death penalty, these findings will remain wholly insulated from any appellate review under the theory advanced by the Louisiana Supreme Court this stance taken by the court is especially devastating given the constitutional flaws in the trial court's instructions to the jury with regard to the third aggravating circumstance as previously noted by petitioner. Absent a review of the other aggravating circumstance by the Louisiana Supreme Court there is no assurance that the jury's discretion has been "suitable directed and limited," Gregg v. Georgia, supra 428 U.S. at 189.

Moreover, this case raises an important issue of the responsibility of state supreme courts in considering appeals of capital cases. Thus, it seems necessary that this Court grant petitioner certiorari in order to provide the Louisiana Supreme Court and other state supreme courts the necessary guidance in a matter so grave as to whether a man should live or die.

III

THE PETITIONER'S RIGHT TO AN IMPARTIAL JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY THE DISMISSAL FOR CAUSE OF THREE JURORS WHO NEVER STATED THAT THEY WERE IRREVOCABLY COMMITTED TO VOTE AGAINST THE DEATH PENALTY.

The jury selection process of petitioner's trial commenced on April 16, 1977 (M.4 Tr. Vol. I).[9] Jurors were questioned in panels from six to two jurors. Three of those jurors, Jurors Gooden, Martin and Brou, were challenged for cause by the prosecutor and such challenges were sustained by the trial court.[10]

---

[9] The parenthetical references are to the record filed in the trial court "M" refers to the minutes of the court and "Tr" to the Reporter's Transcript of the trial proceedings. "VOL I" and VOL II refers to Volumes of the transcript.

[10] Mr. Sinquefield was the prosecutor. Mr. Covell and Mr. Weimer were the attorneys for petitioner. The full inquire of these jurors is in Appendix F to this petition.

The basis of the challenges was that all three jurors were so opposed to the imposition of capital punishment that they could not fairly and objectively listen to the facts of the case in determining whether the petitioner should live or die. This basis for the exclusion is unsubstantiated by the record in this case.

During voir dire the prosecutor asked the trial jury panel if they could "return anverdict that would require the defendant to be put to death?" (Tr.Vol. I at 83). In response, Juror Gooden stated, "I don't think I could." (Tr. Vol. I at 83). Juror Martin answered:

> Sir, with the degree that I hold by being an officer of the church and I'm representing God, I wouldn't want to do it. (Tr. Vol. I at 83).

In a later point of voir dire Juror Brou was asked by the prosecutor whether she could return a verdict that "mandates that the defendant be put to death by eletrocution." (Tr. Vol. I at 185). Juror Brou responded "I don't think I can do that." (Tr. Vol I at 186).

None of the Jurors ever stated that there were no circumstances under which he or she could return a verdict of death. In fact when Jurur Brou (the only one out of the three to be asked directly) was asked if "there [were] any circumstances which she could return a verdict that would require a defendant to be electrocuted," (Tr. Vol. I at 186) she responded:

> Well, of course, I don't know that much about the case. I always think in terms of how hideous the crime is because I don't know that much about it. I don't know. I don't think I can do it. (Tr. Vol. I at 186).

The Court in Witherspoon v. Illinois, 391 U.S. 510 (1968) articulated the test to be applied in cases to determine if a juror could be constitutionally challenge for cause because of his or her feelings against capital punishment. The court stated:

> Unless a venireman states unambiguously that he would automatically vote against

> the imposition of capital punishment no matter what the trial might reveal. It simply cannot be assumed that that is his position. 391 U.S. at 516.

None of the statements of Jurors Brou, Martin and Gooden can be described as those of persons who would automatically vote against capital punishment. At most Juror Brou's testimony on voir dire can be described as an expression of general scruples against capital punishment. Jurors Martin and Gooden's testimony can be described as conscientious or religious scruples toward capital punishment. This is especially true since the test established in Witherspoon v. Illinois, supra, has been stringently followed. Davis v. Georgia, 429 U.S.122, 123 (1976); Adams v. Texas, ____ U.S.___, 27 Cr. L. Rep. 3229 (1980).

Thus, exclusion of Jurors Brou, Martin and Gooden by the trial court was in violation of petitioner's right to a fair and impartial jury under the federal constitution. Consequently petitioner submits that the judgement of his death sentence by the Louisiana Supreme Court should be vacated and that his case be remanded to that court for further proceedings.

CONCLUSION

For the reasons stated above, petitioner ROBERT WAYNE WILLIAMS respectfully urges this Court to grant his petition for a writ of certiorari to the Supreme Court of Louisiana for its failure to review two of the aggracating circumstances found by the sentencing jury. Or petitioner urges the Court to grant his petition for a writ of certiorari to the Supreme Court of Louisiana and remand this case for the other two issues cited by petitioner.

October 13, 1980

RESPECTFULLY SUBMITTED,

BELHIA V. MARTIN
344 Camp Street, Suite 708
New Orleans, LA 70130
(504) 581-3647

Counsel For Petitioner

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

RECEIVED
OCT 20 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

80-5565

APPENDIX A

APR 7 1983

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

VERSUS

NO. 65,563

ROBERT WAYNE WILLIAMS

On Appeal from the Nineteenth Judicial
District Court, Parish of E. Baton Rouge
Honorable Frank Foil, Judge

JAB 7 Jtm 07C JW PBL & pa 7ABn

BLANCHE, Justice.*

The defendant, Robert Wayne Williams, was charged with first degree murder in violation of La. R.S. 14:30. He was found guilty and sentenced to death. On appeal, the defendant urges seven assignments of error.

During the trial, the state adduced the following facts: On January 5, 1979, the defendant and Ralph Holmes entered the A & P Supermarket located at 3525 Perkins Road in Baton Rouge. Both men placed ski masks over their faces and Williams pulled out a 12-gauge sawed-off shotgun. They then approached the security guard, Willie Kelly, age 67, who was bagging groceries. Ralph Holmes tried to remove Kelly's pistol from his holster. As Kelly made a move with his hand toward his pistol, Williams yelled "Don't try it", and immediately shot Kelly in the face at point blank range. Williams and Holmes then proceeded to complete the robbery. During this process, Holmes pistol-whipped one of the customers, and Williams accidentally shot two people in their foot. The police received a telephone call from an informant implicating Holmes, Williams and Williams' wife. Following their arrest, both Williams and his wife gave confessions which implicated themselves in the crime.

Dennis J. concurs in part and dissents in part for reasons to be assigned.

*Chief Judge Paul B. Landry, Jr., retired, participated in this decision as Associate Justice Ad Hoc.

Dixon C.J. ~~concurs~~ concurs, disagreeing w/ propositions stated in assignment

Assignment of Error Number 1

By this assignment, the defendant contends that the trial court erred in denying the defendant's challenge for cause of the prospective juror Gladys Almand. The defendant argues that Mrs. Almand was a hardship case and should have been excluded from the jury. The voir dire examination revealed that Mrs. Almand was divorced with two children, ages 14 and 17, living at home. Both children attended school and Mrs. Almand indicated that she had had small problems with the younger child at school. The defendant argues that the testimony of Mrs. Almand indicated that she was preoccupied with her children's welfare and, as a result, could not devote her full attention to the trial. La. C. Cr.P. art. 783 provides in part as follows:

> "B. If jury service, whether criminal or civil, would result in undue hardship or extreme inconvenience, the district court may excuse a person from such service either prior to or after his selection for the general venire, jury pool, or jury wheel. The court may take such action on its own initiative or on recommendation of an official or employee designated by the court."

In ruling on such challenges, the trial court is granted broad discretion, and its ruling will not be disturbed on appeal absent a showing of an abuse of that discretion. See State v. Drew, 360 So.2d 500 (La. 1978); State v. Monroe, 366 So.2d 1345 (La. 1978). In the instant case, a review of the record of the voir dire examination does not show an abuse of that discretion. Although Mrs. Almand did have two teenaged children, nothing in her testimony indicated the type of circumstances which would render sitting on a sequestered jury a particular hardship.

For these reasons, the assignment is without merit.

Assignments of Error Numbers 4 and 5

By these assignments, the defendant argues that the trial court erred in failing to suppress his confession, and in allowing the introduction of the taped confession and signed waiver of rights form at trial.

The defendant asserts that his confession was not freely and voluntarily given. He does not claim that any overt or physical coercion or intimidation was involved; rather, he maintains that the confession was obtained in a psychologically coercive atmosphere. The defendant claims that the police officers intentionally left the door open to his wife's interrogation room so that he could hear their questioning of her while he waited in the next room. Thus, he maintains that he was psychologically coerced into confessing because he could hear his wife crying.

La. R.S. 15:451 provides as follows:

> "Before what purposes [purports] to be a confession can be introduced in evidence, it must be affirmatively shown that it was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises."

The question of voluntariness of a confession, including a determination of the defendant's psychological state of mind, will be answered from the facts and circumstances of each case. Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975). Thus, the admissibility of a confession is, in the first instance, a question for the trial judge. His conclusions on the credibility and weight of the testimony will not be overturned on appeal unless they are not supported by the evidence. State v. Gaines, 354 So.2d 548 (La. 1978).

Although the defendant claims that his confession was induced by his emotional disturbance over his wife's interrogation, the evidence does not support such a conclusion. The evidence reveals that the defendant and his wife were

arrested at 10:30 a.m., at which time he was read his Miranda rights. Subsequently, the defendant gave a taped confession between 4:30 and 7:30. The defendant testified that he was upset during his interrogation, but there is no other indication that his emotional distress was so severe that he was unable to voluntarily give a statement. The police officers testified that the door to the interrogation room of defendant's wife was closed, and that it was unlikely that the defendant heard much of what went on. Further, it should be noted that the defendant's confession was essentially exculpatory in nature since he claimed that the shotgun went off accidentally.

For these reasons, we conclude that the trial court's ruling as to the voluntariness of the confession was supported by the evidence. The assignments are without merit.

Assignment of Error Number 3

In this assignment, defendant contends that the trial judge erred in allowing the introduction of evidence of the armed robbery. The defendant argues that, as he was charged with first degree murder, the evidence of the armed robbery served no probative purpose and was extremely prejudicial since first degree murder requires proof of specific intent to kill or cause great bodily harm, and proof of the armed robbery does not contribute to the proof of specific intent.

We find that the evidence was admissible as part of the res gestae. La. R.S. 15:448 provides:

> "To constitute res gestae the circumstances and declarations must be necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction."

Thus, evidence that forms part of the res gestae is always

admissible. Here, there is no doubt that the armed robbery was an immediate concomitant of the murder and formed, in conjunction with it, one continuous transaction. See State v. Matthews, 354 So.2d 552 (La. 1978); State v. Williams, 375 So.2d 364 (La. 1979); State v. Donahue, 355 So.2d 247 (La. 1978).

For these reasons, we find the assignment is without merit.

Assignment of Error Number 8

By this assignment, the defendant contends that the trial court erred in imposing the death sentence. He argues that the imposition of the death penalty violates both the eighth amendment to the United States Constitution and art. 1, §20 of the Louisiana Constitution.

The United States Supreme Court has indicated that the death sentence, when imposed on a subject convicted of murder, is not necessarily unconstitutional. See Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950 (1976). Similarly, this Court has recognized in State v. Myles, ____ So.2d ____ (La. 1979), (No. 63,567) (rehearing granted), that art. 1, §20 does not prohibit the imposition of the death penalty in appropriate cases.

For these reasons, we conclude that the defendant's argument that the death penalty is, per se, unconstitutional is without merit.

Assignment of Error Number 7

The defendant claims that the court erred in denying his motion in arrest of judgment. The defendant maintains that La. C.Cr.P. art. 905 is unconstitutional in that it does not give the jury an acceptable constitutional standard with which to make the determination that the death penalty

should be imposed.

Our capital sentence law, following the decision in Roberts v. La., 428 U.S. 325, 96 S.Ct. 3001 (1976), was modeled upon the Georgia statute which was upheld by the U.S. Supreme Court in Gregg v. Georgia, supra. In State v. Martin, 376 So.2d 300 (La. 1979), we found that our present sentencing scheme does provide adequate safeguards against the arbitrary imposition of the death penalty.

For these reasons, we find the defendant's assignment without merit.

Assignment of Error Number 6

By this assignment, the defendant argues that the trial court erred in denying his motion for a new trial. The defendant maintains that a new trial should have been granted because the state failed to prove an essential element of the crime, i.e. specific intent to kill or to inflict great bodily harm.

The Louisiana Constitution limits this Court's review of criminal convictions on appeal to questions of law. La. Const. art. 5, §5(c). Thus, only when there is no evidence of an essential element of the crime charged can this Court's appellate jurisdiction be invoked to reverse a conviction on an evidentiary review. State v. Valentine, 364 So.2d 595 (La. 1978); State v. Tucker, 354 So.2d 521 (La. 1978); State v. Main Motors, Inc., ____ So.2d ____ (La. 1979) (No. 64,849).

La. R.S. 14:10 defines specific intent as follows:

> "(1) Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired, the prescribed criminal consequences to follow his act or failure to act."

La. R.S. 15:445 provides in part as follows:

> "In order to show intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment,

> for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction."

Specific intent is a state of mind and as such, it need not be proven as a fact, but may be inferred from the circumstances of the transaction and the actions of the defendant. Thus, charging the victim in a threatening manner and trying to get at him with a knife over a bar has been found to be evidence of specific intent to kill. State v. Gardner, 241 La. 275, 128 So.2d 655 (1961). Likewise, the pointing of a gun at the victim as it was fired has been ruled evidence of a specific intent to kill. State v. Procell, 365 So.2d 484 (La. 1978).

The defendant herein armed himself with a sawed-off shotgun. He and his partner entered the A & P Supermarket and proceeded immediately toward Willie Kelly. His partner tried to disarm Kelly. At Kelly's slightest movement, the defendant levelled the sawed-off shotgun within two feet of the victim's face, screamed "Don't try it", and immediately shot Kelly's face off at point blank range.

We find that there is ample evidence in the record to support the jury's conclusion that there was specific intent to kill or to inflict great bodily harm.* For these reasons, the assignment is without merit.

Sentence Review

Rule 905.9.1 requires a mandatory review by this Court of any case wherein the death penalty was imposed to determine whether it was excessive. The rule sets forth three criteria of review as follows:

> "Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine: (a) whether the sentence was imposed under the influence

*This factual finding supports defendant's conviction irrespective of the standard of review. See Jackson v. Virginia, 99 S.Ct. 828 (1979).

> of passion, prejudice or any other arbitrary factors, and (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Our review of the entire record does not reveal any factors which would indicate that sentence was imposed under the influence of passion, prejudice or any other arbitrary factors.

The jury found the following three aggravating circumstances:

> "(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery; ... (d) the offender knowingly created a risk of death or great bodily harm to more than one person; ... (g) the offense was committed in an especially heinous, atrocious, or cruel manner; ..."

The evidence clearly supports the conclusion that the victim was murdered in the course of an armed robbery. The state witnesses' testimony is unrefuted that the two assailants removed money from the store's cash registers and safe while holding various people at gunpoint.

The jury having properly concluded that at least one statutory aggravating circumstance existed, it was within their power to return a recommendation of death without finding other aggravating circumstances. Thus, further inquiry as to whether these other aggravating circumstances were properly found to exist is merely cumulative and unnecessary to support the jury's verdict.

In accordance with Rule 905.9.1, §3, the trial court completed a Uniform Capital Sentence Report. We have reviewed this report in conjunction with the post-sentencing report. The defendant is a 27-year-old black male, married

with one infant daughter. The evidence at trial shows that his wife drove the getaway car and her uncle, Ralph Holmes, was the defendant's other accomplice. The defendant completed school through the tenth grade and psychiatric evaluation revealed that the defendant could distinguish between right and wrong and showed no behavioral disorders.[1] The defendant does not have a significant prior criminal record.[2] The defendant claims that he has been injecting preludin for six years and committed the robbery in order to obtain drugs. At the sentencing hearing, the defendant argued three statutory mitigating circumstances.

The defendant argues that his lack of a significant prior criminal record and his drug-induced mental disturbance were significant mitigating circumstances which required the imposition of a life sentence. We have previously affirmed death sentences imposed despite the absence of any significant prior criminal record. See State v. Williams, ____ So.2d ____ (La. 1980) (No. 64,987); State v. Martin, 376 So.2d 300 (La. 1979). Further, this Court has affirmed a sentence of death where the defendant argued voluntary intoxication as a mitigating circumstance. State v. Prejean, ____ So.2d ____ (La. 1979) (No. 64,813). Thus, we find that the arguable presence of these mitigating circumstances does not necessarily render this sentence disproportionate.

---

[1] In his sentence report, the trial judge noted that at the time of the defendant's indictment, he outwardly exhibited possible mental problems. Both doctors suspected the defendant was faking mental illness, especially since his behavior was normal when he was not being observed. After the sanity hearing, the defendant did not again raise the issue of sanity.

[2] The defendant was previously convicted of resisting arrest and of misdemeanor theft.

In conformity with § 4(B), the district attorney has compiled a sentence memoranda which contains a synopsis of each first degree murder case in the district since January 1, 1976.

The sentence review memoranda shows that there have been 28 murder prosecutions in East Baton Rouge Parish with eleven resulting in first degree murder convictions. Of these eleven, only three of the defendants were sentenced to death. These three cases are strikingly similar in that all three defendants were the actual killers and the crimes all arose during the perpetration of armed robberies. See State v. Williams, ____ So.2d ____ (La. 1980) (No. 65,563); State v. Clark, No. 66,573, appeal pending.[3]

Thus, a review of the sentences imposed in the same parish shows that in the cases most similar to the defendant's, the death penalty was imposed. Our review also shows a dissimilarity between the defendant's case and the other first degree murder convictions in that arguably, there are no aggravating circumstances[4] or there were present mitigating circumstances which justified the jury's recommendation of life imprisonment.[5]

---

[3]Although both Michael Glover and Ralph Holmes, Jr. were convicted of first degree murder, they were not sentenced to death. However, both participated as principals, as distinguished from being the actual perpetrator, in the respective crimes committed with Colin Clark and Robert Williams.

[4]State v. James Collins, ____ So.2d ____ (La. 1980) (No. 64,659); State v. Roosevelt Allen, No. 65,226, (appeal pending); State v. Foote, ____ So.2d ____ (La. 1980) (No. 65,151); State v. Norman Spooner, 368 So.2d 1086 (La. 1979).

[5]State v. Donald Edwards, ____ So.2d ____ (La. 1979) (No. 64,204); State v. Steven Howard, ____ So.2d ____ (La. 1980) (No. 64,986); State v. Glover, ____ So.2d ____ (La. 1980) (No. 65,373); State v. Holmes, No. 65,846 (appeal pending).

In light of the above considerations, we are unable to conclude that the sentence imposed here is disproportionate to that imposed in similar cases.

For the above assigned reasons, the sentence and conviction of the defendant are affirmed.

AFFIRMED.

* * *

APR 9 1980

SUPREME COURT OF LOUISIANA

NO. 65,563

STATE OF LOUISIANA

VERSUS

ROBERT WAYNE WILLIAMS

DENNIS, Justice, concurring in part and dissenting in part.

I concur in the majority's affirmance of the defendant's conviction, but I respectfully dissent from its refusal to set aside the death penalty and order a new capital sentence hearing. The jury found three aggravating circumstances, namely, that the murder occurred during the commission of an armed robbery, that the defendant knowingly created a risk of death or great bodily harm to more than one person, and that the murder was committed in an especially heinous, atrocious or cruel manner. See La. C.C.P. art. 905.4 (a) (d) and (g). The record will not support beyond a reasonable doubt the findings that the defendant knowingly risked the lives of more than one person, nor that the murder was especially heinous. Our constitutional mandate to review death sentences with the utmost care requires that we remand this case for a new sentencing hearing to permit the jury to make its grave decision without consideration of erroneous and prejudicial findings of aggravating circumstances. I cannot say beyond a reasonable doubt that the jury, told that it may not consider this murder especially heinous or that it may not find that more than one life was knowingly risked, would

persist in it recommendation of death.

Because of the qualitative difference between the death penalty and all others under the criminal law, a correspondingly greater need for reliability exists in the determination that a defendant must die for his crimes. Lockett v. Ohio, _____U.S._____, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Gardner v. Florida, 430 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

The Due Process Clause and Article 1, § 2 of the Louisiana Constitution protect every accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. Jackson v. Virginia, _____U.S._____, 99 S.Ct. 2781, _____L.Ed.2d_____ (1979); In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Searle, 339 So.2d 1194 (La. 1976). In view of our duty to ensure a greater degree of reliability when the death sentence is imposed, it is clear that a jury finding of an aggravating circumstance, as a matter of constitutional and statutory law, see La. C.Cr.P. art. 905.3, must be founded at least upon proof beyond a reasonable doubt. Lockett v. Ohio, supra. The critical inquiry of this Court in its review of a capital sentence must be whether the evidence in the record can reasonably support a finding of an aggravating circumstance beyond a reasonable doubt. Jackson v. Virginia, supra. Any error in the jury's finding of aggravating circumstances must be scrutinized according to whether such error introduced an element of arbitrariness and capriciousness into the jury recommendation of death, which renders the death sentence constitutionally impermissible. See Lockett v. Ohio, supra; Gardner v. Florida, supra; Proffittt v. Florida, ____U.S.____, 96 S.Ct. 2960, ____L.Ed.2d ____ (1976); State v. English, 367 So.2d 815 (La. 1979); State v. Sonnier, _____So.2d_____, _____ (La. 1979), No. 63,293 (separate opinion).

We cannot approve a death penalty in the face of an error in the capital sentencing hearing unless we are convinced beyond a reasonable doubt that the mistake was harmless to the jury's recommendation. See Lockett v. Ohio, supra; Gardner v. Florida, supra; Proffitt v. Florida, supra; see also, Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, ____, 17 L.Ed.2d 705, 710 (1967).

The jury here clearly erred in finding that the murder was especially heinous and that the defendant knowingly created a risk of death or great bodily harm to more than one person. The proper standard for a finding of an especially cruel or heinous murder incorporates the notion that the murder must have been inflicted through torture or pitiless infliction of unnecessary pain on the victim. State v. English, supra, at 823. Such a limitation protects the statute defining this aggravating circumstance from constitutional attacks for overbreadth and vagueness. See Proffitt v. Florida, supra. Here, the victim was shot almost immediately after the defendant raised his gun; he died instantly. The defendant did not torture or inflict unnecessary pain upon the security guard. The jury's finding of this aggravating circumstance cannot be supported by the record beyond a reasonable doubt.

As to the jury finding that the defendant knowingly created a risk of death or great bodily harm to more than one person, our analysis must focus on whether the defendant contemplated and caused the knowing creation of great risk of death or great bodily harm to more than one person. See State v. English, supra, 367 So.2d at 824; see also Proffitt v. Florida, supra. The defendant shot the security guard at point-blank range, and although customers stood nearby, there is no evidence that a danger existed to these other patrons. In fact, they apparently were further removed from the victim than Ralph Holmees, the defendant's cohort, who was unstrapping

the guard's pistol at the time of the shooting. It is clear that the defendant intended to kill only the guard and, considering the point-blank range, it cannot be found beyond a reasonable doubt that the offender knowingly created a risk of death or great bodily harm to more than one person. Unless this statutory aggravating circumstance is strictly construed, the statute is subject to arbitrary interpretations inconsistent with the constitution. State v. English, supra; Proffitt v. Florida, supra.

The majority errs in basing its opinion on the premise that the death penalty must be upheld if the jury correctly finds "one or more" aggravating circumstances to exist. Apparently the majority sees the role of this Court in capital sentence review as a limited one of determining if there is at least one correctly found aggravating circumstance. This view is clearly in conflict with the Supreme Court's decisions in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and Jackson v. Virginia, supra, and with our constitutional duties, Article 1, § 20 of the Louisiana Constitution, and our statutory responsibilities, La. C.Cr.P. art. 905, et seq. Under these principles, this Court is charged with reviewing the jury's recommendation to determine if the sentence was influenced by passion, prejudice or any arbitrary factor. The presence of two erroneous findings of aggravating circumstances, especially since these factors relate to cruelty and the creation of a risk of death to more than one person, clearly introduces room for a jury to act through passion, prejudice, or arbitrariness.

I respectfully submit that, in order to impose a constitutional death sentence, this case should be remanded for a new sentencing hearing. In the proceeding on remand the jury should be permitted to weigh the single aggravating circumstance of which there was a reasonable evidentiary

basis, i.e., the offender's engagement in armed robbery, against the mitigating circumstances, e.g., Williams' lack of a serious criminal record and his drug addiction, in determining whether the death sentence is appropriate in this case.

* * *

APPENDIX B

Supreme Court of the United States

No. A-1128

ROBERT WAYNE WILLIAMS,

Petitioner

v.

LOUISIANA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 16, 19 80.

/s/ Lewis F. Powell, Jr.

Associate Justice of the Supreme Court of the United States

Dated this 19

day of June, 19 80.

APPENDIX C

APPENDIX D

Article 905: Capital Cases; Sentencing Hearing Required.

Following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein.

Article 905.1: Sentencing Hearing Jury; Commencement.

A. Except as provided in Part B herein, the sentencing hearing shall be conducted before the same jury that determined the issue of guilt. The order of sequestration shall remain in effect until the completion of the sentencing hearing.

B. If an error occurs only during the sentencing hearing which would necessitate the declaration of a mistrial, or the granting of a new trial by the trial court, or if an appellant(si court finds an error that occurred only in the sentencing hearing which would necessitate a remand and a new trial, then the trial court shall be empowered to empanel a new jury under the same procedure set out in Title XXVI, Chapter 3 of The Louisiana Code of Criminal Procedure for determining only the issue of penalty, and the rule of sequestration shall apply to the new jury so empanelled.

Article 905.2: Sentencing Hearing; Procedure And Evidence.

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

Article 905.3: Sentence Of Death; Jury Findings.

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances.

Article 905.4: Aggravating Circumstances.

The following shall be considered aggravating circumstances:

(a) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery;

(b) The victim was a fireman or peace officer engaged in his lawful duties;

(c) The offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping;

(d) The offender knowingly created a risk of death or great bodily harm to more than one person;

(e) The offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) The offense was committed in an especially heinous, atrocious or cruel manner.

Article 905.5: Mitigating Circumstances.

The following shall be considered mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(c) The offense was committed while the offender was under the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance.

Article 905.6: Jury; Unanimous Recommendation.

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Article 905.7: Form Of Recommendations.

The form of jury recommendation shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the

defendant be sentenced to death.

Aggravating circumstance or circumstances found:

s/ _____
FOREMAN"

or

"The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

s/ _____
FOREMAN"

Article 905.8: Imposition Of Sentence.

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Article 905.9: Review On Appeal.

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

RULE XXVIII. CAPITAL SENTENCE REVIEW

RULE 905.9.1 (applicable to La.C.Cr.P. Art. 905.9)

Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

RECEIVED
OCT 20 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

APPENDIX E

BY THE COURT:

ALL RIGHT. PASS IT. LADIES AND GENTLEMEN, AGAIN I'VE PASSED YOU OUT COPIES OF THE INSTRUCTIONS SO THAT YOU MIGHT FOLLOW, IF YOU WISH, IF IT'S EASIER FOR YOU TO HAVE AN UNDERSTANDING THAT WAY. HAVING FOUND THE DEFENDANT GUILTY OF FIRST DEGREE MURDER, YOU MUST NOW DETERMINE WHETHER THE DEFENDANT SHOULD BE SENTENCED TO DEATH OR TO LIFE IMPRISONMENT WITHOUT BENEFIT OF PROBATION, PAROLE OR SUSPENSION OF SENTENCE. IT IS YOUR DUTY TO CONSIDER THE CIRCUMSTANCES OF THE OFFENSE AND THE CHARACTER AND PROPENSITIES OF THE DEFENDANT TO DETERMINE THE SENTENCE TO BE IMPOSED. IN REACHING YOUR DECISION REGARDING THE SENTENCE TO BE IMPOSED, YOU MUST BE GUIDED BY THESE INSTRUCTIONS. YOU ARE REQUIRED TO CONSIDER THE EXISTENCE OF AGGRAVATING AND MITIGATING CIRCUMSTANCES IN DECIDING WHICH SENTENCE SHOULD BE IMPOSED.

STATUTORY AGGRAVATING CIRCUMSTANCES ARE: A. THE OFFENDER WAS ENGAGED IN THE PERPETRATION OR ATTEMPTED PERPETRATION OF AGGRAVATED RAPE, AGGRAVATED KIDNAPPING, AGGRAVATED BURGLARY OR ARMED ROBBERY. B. THE VICTIM WAS A FIREMAN OR PEACE OFFICER ENGAGED IN HIS LAWFUL DUTIES. C. THE OFFENDER WAS PREVIOUSLY CONVICTED OF AN UNRELATED MURDER, AGGRAVATED RAPE OR AGGRAVATED KIDNAPPING. D. THE OFFENDER KNOWINGLY CREATED A RISK OF DEATH OR GREAT BODILY HARM TO MORE THAN ONE PERSON. E. THE OFFENDER OFFERED OR HAS BEEN OFFERED OR HAS GIVEN OR RECEIVED ANYTHING OF VALUE FOR THE COMMISSION OF THE OFFENSE. F. THE OFFENDER AT THE TIME OF THE COMMISSION OF THE OFFENSE WAS IMPRISONED AFTER SENTENCE FOR THE COMMISSION OF AN UNRELATED FORCIBLE FELONY. G. THE OFFENSE WAS COMMITTED IN ESPECIALLY HEINOUS, ATROCIOUS OR

CRUEL MANNER.

NOW, WE WILL FURNISH EACH OF YOU A LIST OF THE STATUTORY AGGRAVATING AND MITIGATING CIRCUMSTANCES WHICH YOU MAY BRING WITH YOU DURING DELIBERATION TO THE JURY ROOM. BEFORE YOU DECIDE THAT A SENTENCE OF DEATH SHOULD BE IMPOSED, YOU MUST UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THAT AT LEAST ONE STATUTORY AGGRAVATING CIRCUMSTANCE EXISTS. IF YOU FIND BEYOND A REASONABLE DOUBT THAT ANY OF THE STATUTORY AGGRAVATING CIRCUMSTANCES EXISTED, YOU ARE AUTHORIZED TO CONSIDER IMPOSING A SENTENCE OF DEATH. IF YOU DO NOT UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THAT ANY OF THE STATUTORY AGGRAVATING CIRCUMSTANCES EXISTED, THEN LIFE IMPRISONMENT WITHOUT BENEFIT OF PROBATION, PAROLE OR SUSPENSION OF SENTENCE IS THE ONLY SENTENCE THAT MAY BE IMPOSED. EVEN IF YOU FIND THE EXISTENCE OF AN AGGRAVATING CIRCUMSTANCE YOU MUST ALSO CONSIDER ANY MITIGATING CIRCUMSTANCE BEFORE YOU DECIDE A SENTENCE OF DEATH SHOULD BE IMPOSED. THE LAW SPECIFICALLY LISTS CERTAIN MITIGATING CIRCUMSTANCES. STATUTORY MITIGATING CIRCUMSTANCES ARE A. THE OFFENDER HAS NO SIGNIFICANT PRIOR HISTORY OF CRIMINAL ACTIVITY, B. THE OFFENSE WAS COMMITTED WHILE THE OFFENDER WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE, C. THE OFFENSE WAS COMMITTED WHILE THE OFFENDER WAS UNDER THE INFLUENCE OR UNDER DOMINATION OF ANOTHER PERSON, D. THE OFFENSE WAS COMMITTED UNDER CIRCUMSTANCES WHICH THE OFFENDER REASONABLY BELIEVED TO PROVIDE A MORAL JUSTIFICATION OR EXTENUATION FOR HIS CONDUCT, E. AT THE TIME OF THE OFFENSE, THE CAPACITY OF THE OFFENDER TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS IMPAIRED AS A RESULT OF METAL DISEASE OR DEFECT OR INTOXICATION, F. THE YOUTH OF THE OFFENDER AT

THE TIME OF THE OFFENSE, G. THE OFFENDER WAS A PRINCIPAL WHOSE PARTICIPATION WAS RELATIVELY MINOR, H. ANY OTHER RELEVANT MITIGATING CIRCUMSTANCES. YOU WILL NOTE THAT YOU ARE AUTHORIZED TO CONSIDER ANY OTHER RELEVANT MITIGATING CIRCUMSTANCE. THE FACT THAT YOU ARE GIVEN A LIST OF AGGRAVATING AND MITIGATING CIRCUMSTANCES SHOULD NOT CAUSE YOU TO INFER THAT THE COURT BELIEVES THAT ANY OF THE CIRCUMSTANCES DO OR DO NOT EXIST. THE LAW REQUIRES THAT THE JURY BE GIVEN SUCH A LIST IN EVERY CASE. WHETHER ANY OF THE AGGRAVATING OR MITIGATING CIRCUMSTANCES EXIST IS A FACT FOR YOU TO DETERMINE BASED UPON THE EVIDENCE PRESENTED. IN ADDITION TO THE EVIDENCE PRESENTED AT THIS SENTENCING HEARING, IN DECIDING THE SENTENCE TO BE IMPOSED, YOU MAY CONSIDER EVIDENCE PRESENTED DURING THE GUILT DETERMINATION TRIAL. I'M GOING TO ASK -- YOU WILL BE GIVEN, AND I'LL SHOW YOU IF YOU WILL LOOK ON THE SECOND TO LAST PAGE, THAT IS A JURY RECOMMENDATION SHEET WHICH I WILL GIVE TO THE FOREMAN. THE FIRST FORM OF THE VERDICT READS, HAVING FOUND THE BELOW LISTED STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES AND AFTER CONSIDERATION OF THE MITIGATING CIRCUMSTANCES OFFERED, THE JURY RECOMMENDS THAT THE DEFENDANT BE SENTENCED TO DEATH. IN THE EVENT YOU UNANIMOUSLY DECIDE THE DEATH PENALTY SHOULD BE IMPOSED, YOU WILL SEE THAT THERE IS A SPACE PROVIDED TO WRITE OUT THE STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES YOU UNANIMOUSLY FIND TO EXIST. AND THEN THE FOREMAN MUST SIGN THIS PART OF THE FORM. THE SECOND PART OF THAT VERDICT SHEET STATES, THE JURY UNANIMOUSLY RECOMMENDS THAT THE DEFENDANT BE SENTENCED TO LIFE IMPRISONMENT WITHOUT BENEFIT OF PROBATION, PAROLE OR SUSPENSION OF SENTENCE. IF THE JURY DECIDES THAT THE LIFE SENTENCE WITHOUT BENEFIT OF PROBATION, PAROLE OR SUSPENSION OF SENTENCE SHOULD BE IMPOSED, THE FOREMAN NEED ONLY SIGN THAT

FORM OF VERDICT. NO LISTING OF AGGRAVATING OR MITIGATING CIRCUMSTANCES IS REQUIRED. NOTHING SAID OR FURNISHED YOU IN THESE INSTRUCTIONS SHOULD BE TAKEN AS AN OPINION OF THE COURT AS TO THE EXISTENCE OR NOT OF STATUTORY AGGRAVATING OR MITIGATING CIRCUMSTANCES. IT IS YOUR RESPONSIBILITY IN ACCORDANCE WITH THE PRINCIPLES OF LAW I HAVE INSTRUCTED TO DETERMINE WHETHER THE DEFENDANT SHOULD BE SENTENCED TO DEATH OR TO LIFE IMPRISONMENT WITHOUT BENEFIT OF PROBATION, PAROLE OR SUSPENSION OF SENTENCE. I WANT TO READ TO YOU TWO SECTIONS OF THE LAW PERTAINING TO WHAT YOU WILL BE DOING.

ARTICLE 905.6, -- YOU DON'T HAVE THIS IN THE SHEET THAT I GAVE YOU. -- OF THE CODE OF CRIMINAL PROCEDURE SAYS THIS. A SENTENCE OF DEATH SHALL BE IMPOSED ONLY UPON THE UNANIMOUS RECOMPENDATION OF THE JURY. IF THE JURY UNANIMOUSLY FINDS THE SENTENCE OF DEATH INAPPROPRIATE, IT SHALL RECOMMEND A SENTENCE OF LIFE IMPRISONMENT WITHOUT BENEFIT OF PROBATION, PAROLE OR SUSPENSION OF SETENCE. ARTICLE 905.8 PROVIDES, THE COURT SHALL SENTENCE THE DEFENDANT IN ACCORDANCE WITH THE RECOMMENDATION OF THE JURY. IF THE JURY IS UNABLE TO UNANIMOUSLY AGREE ON A RECOMMENDATION, THE COURT SHALL IMPOSE A SENTENCE OF LIFE IMPRISONMENT WITHOUT BENEFIT OF PROBATION, PAROLE OR SUSPENSION OF SENTENCE. I'D ASK YOU TO DO THIS FIRST, I'D ASK EACH OF YOU TO TEAR OFF THE LAST SHEET THAT I GAVE YOU OF THE PAPERS THAT I GAVE YOU. TEAR OFF THAT LAST SHEET. THIS IS YOUR LIST OF STATUTORY AGGRAVATING AND MITIGATING CIRCUMSTANCES WHICH YOU MAY TAKE TO THE JURY ROOM WITH YOU. I WILL HAVE THE BAILIFF GIVE TO THE FOREMAN THE JURY RECOMMENDATION SHEET. I WOULD LIKE FOR THE REST OF YOU TO PLEASE PASS TO THE BAILIFF ALL OF THE CHARGES EXCEPT FOR THE STATUTORY, AGGRAVATING, AND MITIGATING CIRCUMSTANCES THAT YOU CAN TAKE TO THE JURY ROOM WITH YOU. PLEASE COLLECT THOSE

APPENDIX F

law. The State is entitled to a juror that can state that if the case is proven and the statutory requirements involving the aggravating circumstances are shown, and you don't feel that the mitigating circumstances outweigh it, that you be able to return a verdict that would carry the mandatory death penalty. Death in Louisiana is still by electrocution. You may have read that some States have passed lethal injection and this type of thing, but that hasn't been passed in Louisiana. Death is still by electrocution. So I guess my next question is, hearing this explanation and knowing that the State will request the death sentence, if you were satisified that the State had proved its case, could you return a verdict that would require this defendant to be put to death?

A (Mr. Green) No, sir.

Q Under no circumstances?

A (Mr. Green) (Juror shakes his head in the negative)

Q Could you Mrs. Gooden?

A (Ms. Gooden) I don't think I could.

Q Even if I proved the case, you wouldn't want to return a verdict that would require the defendant to be put to death?

A (Ms. Gooden) No, sir.

Q Mr. Martin, could you return the verdict?

A (Mr. Martin) Sir, with the degree that I hold by being an officer of the church and I'm representing God, I wouldn't want to do it.

Q It's my understanding, of course, that all citizens would hesitate. I'm sure you would want to look at the case closely before you return a verdict that would require the defendant to be electrocuted, but it's my understanding that you Mr. Green, Mrs. Gooden and Mr. Martin, could not return a verdict that would require this defendant to be put to death.

BY MR. SINQUEFIELD:

Q It's Miss Brou?

A (Ms. Brou) Yes.

Q Let me tell you this as to capital punishment. I'm not asking you to tell me what you will do before you hear the evidence in the case. I have got to put on evidence to prove this defendant's guilt and I have got to put on evidence to prove the statutory aggravating circumstances before I can ask you to return the death penalty, but I intend to do both of those things. I intend to put on evidence to show you that he is guilty, and I intend to put on evidence to show you that one or more aggravating circumstances under Louisiana law are present, which makes the case appropriate for the death penalty. What I'm trying to find is jurors -- In this country you have got a right to agree or disagree with the law, particularly the death penalty. Large segments of our population do not agree with it, and large segments also agree wholeheartedly with it. The State is entitled to have a juror that can say, yes, I can return a verdict requiring the death penalty, if the case is proven to me and if the aggravating circumstances are proven to me. So if you don't know at this point and you are not able to tell me, then that doesn't really help me. Because I don't know what your decision will be down the road. So my question is also framed in this manner. Assuming that I prove the defendant committed first degree murder and is convicted, assume I prove the statutory requirements of aggravating circumstances, which under Louisiana law make the case appropriate for the death penalty, can you return a verdict that mandates that the defendant be put to death by electrocution?

A (Ms. Brou) I don't think I could do that.

Q Okay. I appreciate your being honest with me. And let me ask you this. When you say I don't think I can, what you are telling me, you can't tell me positively that you can; is that correct?

A (Ms. Brou) I know there is certain cases where you read about them and they are so hideous that you just think, oh, the death penalty would be the only good outcome, but this particular case, I don't know.

Q As the Judge told you, this is the killing of a -- Well, I don't know if the Judge said all that, but I think it is before the jury. This is the A & P robbery, murder that occurred on January the 5th of this year. And it is my understanding that you feel that you could not return the death penalty.

A (Ms. Brou) Oh, let's see. I'm afraid I couldn't. I would just be thinking in terms of why can't a person like that be rehabilitated rather than exterminated.

Q So you feel that you could not return the death penalty?

A (Ms. Brou) No.

Q Are there any circumstances which you could return a verdict that would require a defendant to be electrocuted?

A (Ms. Brou) This particular one or just in general?

Q This particular one.

A Any circumstances where I could do that?

Q Yes.

A (Ms. Brou) Well, of course, I don't know that much about the case. I always think in terms of how hideous the crime is because I don't know that much about it. I don't know. I don't think I can do it.

Q Mr. Powell, could you return it?

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS NO. 65,563

ROBERT WAYNE WILLIAMS

In Re: Robert Wayne Williams, Applying for Stay of Execution, (East Baton Rouge Parish)

August 19, 1980

GRANTED. Inasmuch as defendant's execution is scheduled for August 27, 1980 and the Supreme Court of the United States has granted defendant's newly retained counsel until October 16, 1980 to file a petition for a writ of certiorari, defendant's execution is stayed until the Supreme Court of the United States takes final action on his petition or until such time, in advance of that date, as this Court deems proper.

/s/ HTL

/s/ JAD

/s/ PFC

/s/ WFM

/s/ JLD

/s/ FAB

Watson, J., dissents being of the opinion that the stay order should issue from the United States Supreme Court.

Supreme Court of Louisiana
August 19, 1980

Dpty. Clerk of Court
For the Court